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No. 80-2162

IN THE

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.,

Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM[1]

I
THE TAX INVOLVED IN THIS CASE IS ALREADY THE SUBJECT OF A RULING BY THIS COURT SUGGESTING THAT FEDERAL LAW PREEMPTS APPLICATION OF THE NEW MEXICO GROSS RECEIPTS TAX TO NON-INDIAN CONTRACTORS ON THE NAVAJO RESERVATION.

In *Tiffany Construction Co. v. Bureau of Revenue,* 448 U.S. 902 (1980), this Court took action questioning the imposition of New Mexico's gross receipts tax on the receipts of a non-Indian contractor doing road work on the Navajo Reservation upon a section of road built and maintained by the Bureau of Indian Affairs. The same tax, the same reservation, and the same activity, albeit in the far more sensitive area of Indian education, are involved here.

This Court granted Tiffany's petition for writ of certiorari, vacated the adverse judgement against Tiffany, and remanded with instructions to reconsider the case in light of *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980). The case has now proceeded again through the New Mexico courts, which have ruled against Tiffany once more. *Tiffany Construction Co. v. Bureau of Revenue,* N.M. 629 P. 2d 1233 (N.M. App.

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[1] Please refer to footnote 1 of the Jurisdictional Statement for compliance with Rule 28.1.

1980), affirmed in part and reversed in part N. M., 629 P. 2d 1225 (June 1, 1980). [2]

Tiffany is of particular interest because this Court granted certiorari, vacated the lower court's judgment, and remanded on facts which did not involve a "major national goal", 25 U.S.C. 450a(c), or a treaty obligation of the United States, 15 Stat. 669, as is the case here. Nor is *Mescalero* of help to the State because its facts are so different from both *Tiffany's* and ours, as noted by Senior Justice Sosa dissenting in the latest New Mexico Supreme Court decision in *Tiffany*, 629 P. 2d, at 1232-1233:

> The majority here upholds the State tax because it is a tax which falls directly upon the contractor and only indirectly upon the Tribe. They cite *Mescalero* for the proposition that an indirect tax on Indians is permissible, but fail to recognize that the indirect tax in *Mescalero* could be "passed on as the Tribe engages in its resort and other business" (625 F. 2d at 972), whereas the tax in this case cannot be passed on to anyone except the tribe itself. This, then, is the key distinction between the *Mescalero* case and this case since the Tenth Circuit Court of the Appeals repeatedly

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2. To the extent that New Mexico's motion relies on *Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cir. 1980), cert. den. ____ U.S. ____, 101 S. Ct. 1417, 67 L. Ed. 2d 383 (1981), Tiffany* must take precedence as a ruling on the merits over the denial of certiorari in *Mescalero. Parker v. Ellis*, 362 U.S. 574, 575-576 (1960), *Hicks v. Miranda*, 422 U.S. 332 (1975), and generally, 16 Wright and Miller, *Federal Practice and Procedure*, Section 4004, page 510.

> emphasized the fact that the tax could be passed on to the consumer. In addition, the construction of a resort complex is in the nature of a proprietary project of the Tribe for tourist consumption, whereas a road is in the nature of a public or governmental function which provides an essential service to the Tribe.[3]

This reasoning applies with even greater force to the nonprofit Navajo school involved here. In any event, the conflicting rulings of this Court, the Tenth Circuit Court of Appeals, and the New Mexico courts in *Tiffany, Mescalero,* and the instant case provide additional grounds for plenary consideration.

II

THE BUREAU OF REVENUE'S MOTION RESTS ON A CONCEPT OF PREEMPTION WHICH DOES NOT COMPORT WITH ESTABLISHED PRINCIPLES.

Contrary to the State's view, comprehensive federal regulations do cover every aspect of this project including the school construction activity itself, 25 CFR Part 274, the sale of construction materials (constituting one half the cost of the project), 25 CFR Part 252, and the very objective to which these activities were directed, Indian

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[3] The intense interest of the Navajo Tribe in the governmental function of education and in the Ramah school in particular is well documented in the record, which has been transmitted and filed as permitted by Rule 13, and in its motion for leave to file an *amicus* brief in support of Appellants' Jurisdictional Statement.

education, citations too numerous to set forth here (see Jurisdictional Statement, pages 10-14, and Appendices L, N, O, P, and Q). Indeed, the federal government's concern for Indian education pre-date the regulations as presently worded. President's Message on Indian Affairs, 1970 Pub. Papers 564 (1970).

In this case, Congress has tried to build a school for Navajo children. The State, however, would have this Court distinguish between Congress' goal to improve Indian education and the means it chose for doing so, the construction of school facilities. The State's motion depends on an erroneous trial court conclusion that "the state is not taxing education", Motion 2, when the uncontroverted evidence at trial disclosed that the State's tax directly prevented the completion of school and related facilities for which Congressional appropriations were specifically intended. Tr. Pr. 117-128, 202, 222-225, 229-230, 482-484. Navajo education was undeniably burdened by this levy, and therefore the impost constitutes a tax on Indian education in any ordinary sense. Given the manner in which the New Mexico gross receipts tax operates, New Mexico's levy on Lembke's receipts from this project placed an unavoidable financial burden on the Ramah Navajo School Board, a tribal organization under federal law, 25 U.S.C. 450 b (c), and thus depleted the resources needed to finish the project.

Nothing but the actuality that New Mexico's impost has directly impeded fulfillment of Congress' specific purpose at Ramah and the goals of self-government established by the Navajo Tribe and its tribal organization, the school board, is needed to trigger preemption. This point was graphically made in a case involving the same reservation and the same treaty in the unanimous decision in *McClanahan v. Arizona*

State Tax Comm'n, 411 U.S. 164, 174-175 (1973). Said the Court:

> The Treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions....When this canon (that doubtful expressions are to be resolved in favor of Indians) is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Indians from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law -*including state tax law* - to Indians on the Navajo Reservation. See *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S., at 687, 690; *Williams v. Lee,* supra, at 221-222. (emphasis added).[4]

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4. Although *McClanahan* opens with a disclaimer pointing out that it deals only with a direct state impost on an Indian, the citation to *Warren* above and the commentary in footnote 6, 411 U.S., at 170, clearly show a broader reach, since *Warren* in fact involved a gross receipts tax imposed on a non-Indian just like New Mexico's. Moreover, the decisions in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) and *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980) further demonstrate that state levies on non-Indians engaged in activities on Indian reservations protected by federal law or touching federal interests may be barred by preemption.

And see, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1970), *Hines V. Davidowitz*, 312 U.S. 52, 67 (1941), Tribe, *American Constitutional Law*, at 378, and *Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Reservations*, 64 Iowa Law R. 1459, 1477-1478 (1979).

If the Navajo Treaty preempts a state income tax, even though the Treaty does not expressly prohibit state taxation, then it surely must preempt a state tax which burdens an objective which is expressly mentioned in the Treaty — education. It simply cannot be denied that in this Treaty and in the specific construction appropriation acts for this Navajo school board, Congress evidenced an intention to prevent precisely the treasury raid perpetrated by the Bureau of Revenue. The absence of express prohibitions in either the Treaty or the acts is of no consequence, as this Court noted in *White Mountain*, 448 U.S., at 144:

> We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required. (citing *Warren*)

States including New Mexico contributed markedly to the shocking conditions in Indian education uncovered by the Special Senate Subcommittee on Indian Education in 1969.[5] When New Mexico closed Ramah Public High School in 1968, it helped precipitate particular Congressional concern for Ramah Navajos leading to the appropriations which are the subject of this ac-

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5. "Indian Education: A National Tragedy - A National Challenge", Report No. 91-501, 91st Congress, lst Session.

tion. In doing so, Congress has saved the State hundreds of thousands of dollars in State aid for the education of Ramah Navajos, more than off-setting the largely indirect services alluded to by the State, Motion 6. The law of preemption, especially in its Indian manifestation, will not permit the unconscionable taxing of a service and function so vital to America's Indian peoples as occurred here.

Unless this Court is content to permit wholesale erosion of the principles of *Warren, McClanahan, Williams, White Mountain,* and *Central Machinery* to occur, and with it the undermining of Congress' express commitment to improve Indian education generally and at Ramah in particular, it must deny the motion before it.

CONCLUSION

For the foregoing reasons, the motion of the Appellee Bureau of Revenue should be denied and the appeal set down for plenary consideration with briefs on the merits and oral argument, or summary reversal of the decision below should be entered.

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